United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2104

B P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NAPOLEON C. GABRIEL, JACOB R. COHEN AND JUNE COHEN, and MICHAEL MOUMOUSIS,

74-2104

Objectants-Appellants,

-against-

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LeVASSEUR,

Plaintiffs-Appellees,

and

MISSISSIPPI RIVER CORPORATION et al,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR GABRIEL AND MOUMOUSIS, APPELLANTS

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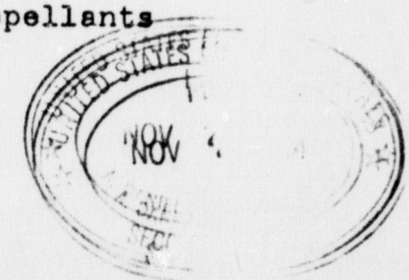

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STATEMENT

This is a reply brief on behalf of Appellants Moumousis and Gabriel in response to the briefs of Alleghany Corporation and Betty Levin, Plaintiffs-Appellees, and LeVasseur Plaintiff Appellee, and those of Defendant Appellees.

POINT I - REPLY

THESE APPEALS ARE ABSOLUTELY NOT FRIVILOUS, BUT AFFORD THIS COURT A RARE AND NEEDED OPPORTUNITY TO CLARIFY THE APPLICATION OF RULE 23 F.R.C.P. SO AS, NOT ONLY TO CORRECT THE MANIFEST INJUSTICE DONE TO APPELLANTS (AS REPRESENTED PARTIES IN THE CLASS ACTION BELOW), BUT, JUST AS IMPORTANT, TO SET FORTH PRINCIPLES OF LAW RELATING THE SCOPE OF THE SETTLEMENT OF A CLASS ACTION TO THE ISSUES RAISED IN THE PLEADINGS.

The plaintiff's class suit below was for better dividends, and the settlement approved was for recapitalization of Mo Pac, a remedy for which there was no cause of action or claim, and a solution which required the appellants to give up their property against their will, without any right to have their stock evaluated.

The rights of appellants, as represented class members, to hold their stock unmolested and undiminished, was never in jeopardy or in issue because of the suit for better dividends. At worst, the suit could have been lost by the representing plaintiffs, and the appellants would still have their property in tact.

It was the so-called settlement agreement and the judgment of the Court approving this settlement, so far removed from the issues in the case, which took away appellants property in their stock, at a price fixed by the Court for settlement purposes only and not for real value.

The plaintiffs-appellees went beyond their authority as class representatives in doing this and abused their trust. The Court, in approving, despite its good intent, had no jurisdiction or adjudicatory power to so act, exceeded its restriction to decide only "cases and controversies", and became involved in advising on a business transaction under the guise of a settlement of a class suit.

This Court must speak out to set the guidelines for Rule 23 (e) F.R.C.P. to avoid such injustice; otherwise, no property owner will be secure and safe in the ownership of his property.

POINT II - REPLY

THE COMPLEXITY AND VOLUMINOUS PAPER OF THIS APPEAL CAN BE QUICKLY AND RATIONALLY CUT THROUGH, AND THE UNHAPPINESS OF APPELLANTS, THE INJUSTICE DONE THEM CAN BE READILY SEEN, AND THE MISAPPLICATION OF RULE 23 (P.R.C.P.) CAN BE READILY SEEN BY CONTEMPLATING THE SIMPLE, HOMEY HYPOTHETICAL SET FORTH BELOW.

Assume there are 30 homeowners living on a city block. Three of the homeowners (Plaintiffs-appellees), as class representatives, sue the City to have the assessed valuation of their homes, and those similarly situated, reduced. Proper and due notice of such a suit is given to the remaining 27 owners, and the action is declared, by the involved court, as a proper class action.

Six years later, with proper notice, the 27 homeowners are notified that the suit for reduced assessment is to be settled on terms outside the issues in the case, viz. that all the 30 owners are to sell to the City their homes for a settlement price of $20,000, no right being preserved to have the real value of each house determined by individual trial in keeping with due process.

The proper court approves the settlement with no provision for dissenting owners to litigate the true value of their homes, which might range, given the opportunity to present evidence at a trial, to five times the settlement value.

The 27 represented owners never gave authority to settle outside the issues of the case; never gave authority to take away their individual rights to their property (stock, in this case), for the purpose of a business arrangement (recapitalization).

To allow such approval (judgment, April, 1973) to prevail is a complete rejection of ownership rights, and contrary to all principles of fairness and the function of a court.

POINT III - REPLY

MOUMOUSIS' MOTION ON NEWLY DISCOVERED EVIDENCE WAS PROPER IN THAT THE NEWLY DISCOVERED EVIDENCE IN DECEMBER, 1973, WAS NOT THAT ALLEGHANY'S (PLAINTIFF-APPELLEE) CLASS B MO PAC STOCK WAS IN A VOTING TRUST WITH FRANKLIN NATIONAL BANK, BUT THAT SAID STOCK, BY ORDER OF THE I. C. C., WAS UNDER CONTINUING JURISDICTION OF THE I.C.C.

Appellees mistake the newly discovered evidence of Moumousis. The record and the Court below refer to the fact that Alleghany's stock was in a voting trust under the control of Franklin.

What the Court did not refer to in May 1, 1973, and which appellants did not know was that Alleghany's Class B Mo Pac stock was to "be continued subject to the continuing jurisdiction of the Commission". (P.14, appellees joint appendix (109MCC331,350, decided 1-27-70)

This continued jurisdiction of the I.C.C. over Alleghany's Class B Mo Pac stock was not known to Moumousis or Gabriel until December, 1973, when immediately Moumousis made his motion.

It is respectfully submitted that Alleghany, by virtue of the I.C.C. continuing jurisdiction, should have revealed this control to the Court and the stockholders, and should first have obtained I.C.C.'s permission to maintain the suit in the first place.

The devious financial activities of Alleghany are revealed in the report of the Interstate and Foreign Commerce sub committee report (P10 appellees joint appendix).

POINT IV - REPLY

THE FACTS REFLECTING THAT ALLEGHANY HAD A SELF INTEREST IN THE SETTLEMENT IN CONFLICT WITH THAT OF THOSE REPRESENTED FIRST CAME TO LIGHT THROUGH ALLEGHANY'S OWN ATTORNEY'S AFFIDAVIT AT THE I.C.C. PROCEEDING, AND MOUMOUSIS IMMEDIATELY TOOK ACTION.

The financial self interest of Alleghany made it impossible for Alleghany to fully represent the class.

This interest only came to light after the settlement was approved by the Court below May 2, 1973, and from an affidavit of M. Lauck Walton submitted in the I.C.C. hearings (appellees Joint A. 17,18).

From this affidavit annexed subsequently to the Moumousis' motion, the Alleghany acquisition of Jones Motor and the continuing jurisdiction of the I.C.C. over Alleghany's Mo Pac stock came to light.

Becoming alerted to Alleghany's acquisition of Jones Motor, the Congressional study relative to Alleghany's involved financial interests in inter-state commerce transportation (appellees joint A. 10-16) came to light and was also annexed to the Moumousis' motion.

It is clear from both documents that Alleghany's interest in the plan of recapitalization of Mo Pac and its tax advantages overrode its obligation to look out for the welfare of the appellants.

POINT V - REPLY

THE JUDGMENT OF MAY 2, 1973, APPROVING THE SETTLEMENT WAS NOT FINAL IN THAT IT WAS SUBJECT TO APPROVAL BY STOCKHOLDERS AND THE I.C.C., AND FEES WERE NOT TO BE SET UNTIL ALL DANGER OF APPEALS HAD PASSED, AND AT PRESENT THERE ARE FOUR APPEALS PENDING IN THE FEDERAL COURTS FROM THE RULING OF THE I.C.C.

At any time after May 2, 1973, the execution of the settlement agreement could have failed for any number of reasons and the case would have been returned to the trial calendar (joint appellees A 232 par. 7.7, 7.9; 219-237).

There are four appeals now pending from the approval of the I.C.C.; and if these appeals are won, the settlement will have to be aborted. These appeals are:

Gillespie v. U. S. of America and the I.C.C.; Civ. 74-239 C (2) U.S.F.D. Ct. E. Div. Mo.

James Gabriel pro se v. U. S. of America and the I.C.C. U.S.F.D. Ct. N.J. 74-471.

Vaiani pro se v. U. S. Of America and the I.C.C., U.S.F.D. Ct., N. J. 74-470.

Wesson pro se v. U. S. of America and the I.C.C., U.S.F.D. Ct., N.J. 74-469.

The granting of fees was premature, because of these appeals, and in light of the terms of the stipulation of settlement (appellees joint A. 233, par.7.10).

POINT VI - REPLY

THE TIMELY GABRIEL APPEAL FROM THE JULY 3RD JUDGMENT SETTING FEES AND FROM ALL PRIOR ORDERS AND JUDGMENTS UPON WHICH IT WAS BASED CAN RAISE THE QUESTIONS AS TO THE VALIDITY OF THE SETTLEMENT AND THE LACK OF JURISDICTION OF THE COURT UNDER THE ZAHN CASE BECAUSE THE SIZE OF THE FEES WAS AWARDED ON THE SUPPOSITION THAT THE WORK DONE WAS FOR A CLASS GROUP IN CONFORMITY WITH RULE 23 (F.R.C.P.), AND THAT THE COURT HAD JURISDICTION, NEITHER OF WHICH WAS SO.

The only base of jurisdiction used by the plaintiffs was that of diversity of citizenship.

Even the amended complaint of Alleghany (amended a few months before the settlement) sets forth diversity as the base of jurisdiction (appellees joint A 180, par. 3). How the Court below could find that jurisdiction was also based on section 27 of the Securities Exchange Act of 1934 is a mystery.

If the action below was not properly a class action, if a class action not properly settled under Rule 23 (F.R.C.P., then, the size of the fees to be awarded must, in logic, be diminished, or even set aside.

POINT VII - REPLY

THE GRANTING OF FEES IN THE CASE BELOW TO THE LEVIN- LeVASSEUR'S ATTORNEYS FOR SERVICES PERFORMED IN AN ENTIRELY DIFFERENT AND PRIOR CASE CONSTITUTED A FURTHER ABUSE OF THE RESPONSIBILITY OF THE PLAINTIFFS-APPELLEES, AS REPRESENTATIVE OF A CLASS, BECAUSE (A) APPLICATION FOR FEES IN THE PRIOR CASE WAS MADE AND DENIED BY THE FEDERAL COURT THEN INVOLVED, THUS CONSTITUTING THE LAW OF THE CASE, AND PERHAPS RES JUDICATA: (B) THE RECIPIENTS OF SUCH ADDITIONAL FEES ARE GUILTY OF LACHES, AND FAILED TO DISCLOSE TO THE CLASS IN THE CASE BELOW THAT THEY EXPECTED TO BE REIMBURSED FOR PRIOR SERVICES, WHEN SAID CASE WAS STARTED: (C) THE PRIOR LITIGATION IN NO WAY WAS NECESSARY FOR THE SUIT BELOW FOR BETTER DIVIDENDS: AND (D) THERE WAS NO SHOWING THAT THE SAME PEOPLE WERE INVOLVED.

Despite the fact that the attorneys for Levine and LeVasseur had applied in a previous, different case for a fee award against Mo Pac, (Missouri Pac. R. Co. v. Slayton 407 F 2d 1078) and the U. S. Court of Appeals 8th Circuit denied the awarding of such a fee, the District Court below ordered Mo Pac to pay fees in this instant case for services rendered in the prior different case.

No case cited in the brief of the said attorneys addresses itself to such a situation, which is obviously a res judicata bar to a right for such fees, and at the very least barred by the law of the case.

Success in the pricr case was not a pre-requisite for the institution of the case below for better dividends by any stretch of the imagination, and the attorneys seeking such fee award do not so claim.

The said attorneys have slept on their rights (if they had any after Slayton supra), and in fairness should have disclosed to the Court below, when the case below was sought to be made a class action, that they harbored the secret intent to claim fees for services supposedly rendered in a prior case for perhaps different Class B stockholders--different than those which existed when the case below was made a class suit.

POINT VIII - REPLY

ZAHN V. INTERNATIONAL PAPER (414 U.S. 291 (1973), REQUIRING THE JURISDICTIONAL AMOUNT OF $10,000 FOR EACH REPRESENTED CLASS MEMBER IN A SUIT BASED ON DIVERSITY OF CITIZENSHIP, AND INVOLVING ALLEGED CONDUCT OF THE DEFENDANT IN POLLUTION OF A LAKE, COULD BE CONSTRUED AS A RULE 23 b 2 F.R.C.P. CLASS SUIT SITUATION, AND THEREFORE SHOULD CONTROL THIS INSTANT CASE, WHICH WAS BASED SOLELY ON DIVERSITY OF CITIZENSHIP, APPELLANTS LACKING THE JURISDICTIONAL AMOUNT: OR AT THE VERY LEAST SHOULD EVOKE FROM THIS COURT A CLARIFICATION OF THE APPLICATION OF RULE 23 (b) F.R.C.P.

F. R. C. P. 23 (b) (2) provides: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or"

International Paper Co., in allegedly polluting the lake to the alleged damage of lake property owners, could, if the case were proven, be subjected to injunctive relief.

POINT IX - REPLY

THE FACT THAT THE SETTLEMENT BELOW WAS SO FAR REMOVED FROM THE ISSUES DEVELOPED IN THE PLEADINGS, AND THAT THE SETTLEMENT REQUIRED APPELLANTS, AS PERSONS REPRESENTED ON THE PLAINTIFFS' SIDE TO GIVE UP PROPERTY RIGHTS IN THEIR STOCK BY REDUCTION OF THEIR EQUITY FROM 65.5% to 25.5%, AT A PRICE DETERMINED BY THE COURT FOR SETTLEMENT PURPOSES ONLY, WITH NO PROVISION TO HAVE THE TRUE VALUE OF THEIR STOCK AND THAT OF OTHER DISSIDENT STOCKHOLDERS DETERMINED IN A SEPARATE PROCEEDING, IS, ON ITS FACE, UNFAIR AND A VIOLATION OF DUE PROCESS OF LAW.

POINT X - REPLY

INASMUCH AS APPELLANTS WOULD HAVE BEEN BETTER OFF IF THE CASE BELOW HAD BEEN TRIED AND LOST, THE FAIR AND JUST THING FOR THE CLASS REPRESENTATIVES TO HAVE DONE BELOW WOULD HAVE BEEN ANYONE OF THE FOLLOWING: (A) LET THE SUIT GO TO TRIAL TO BE WON OR LOST: (B) REQUIRE ALLEGHANY TO FIRST OBTAIN (1) THE PERMISSION OF THE ICC TO ENTER INTO AN AGREEMENT OF RECAPITALIZATION BEFORE THE COURT WOULD CONSIDER RECAPITALIZATION, SINCE THE STOCK OF ALLEGHANY WAS UNDER THE CONTINUING JURISDICTION OF THE ICC, AND (2) APPROVAL OF THE STOCKHOLDERS, UNINFLUENCED BY AN IMPRESSIVE OPINION OF A FEDERAL DISTRICT COURT: (C) PROVIDE THAT DISSIDENT CLASS B MO PAC STOCKHOLDERS WOULD HAVE THE RIGHT TO HAVE THE TRUE VALUE OF THEIR STOCK DETERMINED: OR (D) FOLLOW THE WESSON PLAN (POINT V OF APPELLANTS MAJOR BRIEF) WHICH AFFORDED AN INTELLIGENT LEGAL AVENUE TO ATTAIN ALL WHICH THE COURT BELOW SAID IT WISHED TO ATTAIN.

CONCLUSION

For the reasons set forth above, the undersigned requests that (a) the judgment of this Court below of July 3, 1974, setting fees for the attorneys for Plaintiffs appellees be reversed; (b) that the settlement calling for the recapitalization of Mo Pac be set aside; (c) that the case be remanded to the trial court for either trial or dismissal; and (d) for such other and different relief which to this Court seem just and proper.

Dated: Brooklyn, New York
31 October 1974

Respectfully submitted,

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Affidavit of Mailing

STATE OF NEW YORK

COUNTY OF New York

Gerard M. Carey, being duly sworn, deposes and says that he is the attorney for the appellants herein and that on the 30th day of October, 1974, he served true copies of the within appellants reply brief upon the following attorneys by depositing in an official depository under the exclusive care and custody of the United States Post Office Department, within the State of New York, enclosed in a post-paid, properly-addressed envelope.

Sworn to before me this
30 day of October, 1974
Harriet C. Weinstock

HARRIET C. WEINSTOCK
COMMISSIONER OF DEEDS
CITY OF NEW YORK - NO. 020
Certificate Filed in New York County
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